UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 20A00059
ALLEN HOLDINGS, INC., Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL DISCOVERY

(*August 16, 2000*)

I. INTRODUCTION

On June 25, 2000, the United States of America (Complainant) filed a Motion to Compel Discovery against Allen Holdings, Inc. (Respondent). In its Motion, Complainant alleges that Respondent raised meritless objections to, or failed to provide adequate responses to, Complainant's Interrogatories and First Request for Production of Documents. In rebuttal, Respondent argues that Complainant's Motion to Compel is *prima facie* invalid because Complainant did not, prior to filing the Motion, confer in good faith with Respondent in an effort to obtain the requested information without judicial intervention. In the alternative, Respondent argues that it has responded adequately to Complainant's discovery requests. Having considered the arguments of all parties at great length, I hereby conclude that Complainant satisfied the good-faith conferment requirement of 28 C.F.R. § 68.23(b)(4). Consequently, Complainant's Motion to Compel Discovery is *prima facie* valid. As to the merits, I hereby GRANT IN PART AND DENY IN PART Complainant's Motion to Compel Discovery.

Complainant's Motion to Compel is GRANTED with respect to Requests for Production Numbers 5, 10, 11, 12 and 13. Similarly, Complainant's Motion to Compel is GRANTED IN PART with respect to Requests for Production Numbers 3, 4, 9 and 14. Although Respondent must produce documents in response to these four Requests for Production, I have narrowed its burden of production to documents that are either recent or highly relevant. Complainant's Motion to Compel is DENIED with respect to Requests for Production Numbers 2, 6, 7, 8, 15 and 16. Moreover, Complainant's Motion to Compel is DENIED insofar as it alleges that Respondent filed its Interrogatory responses late. However, Complainant's Motion to Compel is GRANTED insofar as it alleges that Respondent failed to provide proper attestation for its Interrogatory answers.

Respondent must resubmit its Interrogatory responses to Complainant, with a properly sworn attestation, by not later than August 25, 2000. Moreover, Respondent must produce documents in response to Requests for Production 3, 4, 5, 9, 10, 11, 12, 13 and 14 by September 5, 2000.

II. FACTS

A. General Background

On March 31, 2000, Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent violated 8 U.S.C. § 1324a(a)(1)(B)(i), which makes it unlawful for employers to hire an individual without complying with the employment eligibility verification procedures specified in 8 U.S.C. § 1324a(b) and its implementing regulations. On May 10, 2000, Respondent filed its Answer to the Complaint.

On June 1, 2000, Complainant served its Interrogatories upon Respondent. On June 7, 2000, Complainant served its First Request for Production of Documents upon Respondent. On July 6, 2000, Complainant verbally agreed to extend Respondent's deadline for filing responses to the discovery requests. According to Complainant, the parties agreed that Respondent would file its responses to both discovery requests on July 12, 2000; however, Respondent contests Complainant's account and argues that Complainant authorized Respondent to file its Interrogatory responses at any time during the week ending July 14, 2000. The parties did not memorialize their July 6, 2000, conversation in a written agreement.

On July 12, 2000, Respondent submitted its response to Complainant's First Request for Production of Documents. Respondent provided documents in response to only two (2) of Complainant's 17 Requests. With respect to the remaining 15 requests, Respondent either objected or failed to produce the requested documents on the ground that she had not yet accumulated the requested documents from Respondent. On July 14, 2000, Respondent submitted responses to Complainant's 36 Interrogatories. In its response, Respondent provided answers to Interrogatories Numbered 1-6, 10 and 25, objected to Interrogatories Numbered 12-15, 17, 19-22, 28-32, 34 and 36, both objected to and partially answered Interrogatories Numbered 7-9, 11, 16, 23, 24, 27 and 33, and acknowledged its continuing duty to provide answers to Interrogatories Numbered 18, 26 and 35. Respondent's responses to Complainant's Interrogatories were not signed under oath by an officer or employee of Respondent; instead, the responses bear the unsworn signature of Respondent's counsel.

B. Complainant's Motion to Compel

On July 25, 2000, Complainant filed a Motion to Compel Discovery (C. Mot.) with the court. In its Motion, Complainant argues that Respondent should be barred from objecting to Complainant's Interrogatories because Respondent failed to submit its responses by the July 12, 2000, deadline and because the responses were not signed under oath by an officer or employee of Respondent. C. Mot. at 6-8. In support of its claim that Respondent must personally sign

interrogatories under oath, Complainant filed a supplemental pleading in which it cites Ironworkers Local 455 v. Lake Constr. & Dev. Corp., 6 OCAHO no. 911, 1039, 1042-43 (1997).[1] With respect to Complainant's First Request for Production of Documents, Complainant seeks an Order from this court overruling Respondent's objections and compelling Respondent to provide full responses to the 15 remaining Requests for Production.

Attached to Complainant's Motion to Compel is a six-page document entitled "Certificate of Conference" in which Complainant's counsel discusses at length the efforts she undertook to confer with Respondent's counsel in order to secure the requested information without judicial intervention.

C. Respondent's Opposition to Complainant's Motion to Compel

On August 8, 2000, Respondent filed its Opposition to Complainant's Motion to Compel Discovery (R. Opp.). With respect to the contested Interrogatories, Respondent makes three principal arguments. First, Respondent contends that Complainant's Motion to Compel should be denied because Complainant failed to confer in good faith with Respondent in an effort to secure the requested information or documents without judicial intervention. R. Opp. at 3-4. Second, Respondent argues that Complainant is factually incorrect in asserting that the parties had agreed

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[1] OCAHO precedents appearing in bound volumes or on OCAHO's website are cited according to the following format:

United States v. Davila, 7 OCAHO no. 936, 252, at 262 (1997).

(1) "United States v. Davila" refers to the case name.
(2) "7 OCAHO" refers to the volume number of the relevant bound volume containing OCAHO precedents.
(3) "no. 936" refers to the reference number assigned to the specific decision. Each published OCAHO decision bears a chronological reference number. In the example, "no. 936" simply reflects that Davila is the 936th OCAHO decision that has been published.
(4) "252" refers to the page number of the relevant bound volume upon which the cited decision begins. Thus, in the example, Davila begins on page 252 of bound volume 7.
(5) "at 262" refers to the pinpoint citation for the language or concept that is being cited.
(6) When citing looseleaf opinions that have been published on OCAHO's website but that have not yet been paginated for publication in a bound volume, no first page is indicated in the citation. Instead, such cases are cited only by reference number and pinpoint citation. Thus, in the following citation, Ruan v. U.S. Navy, 8 OCAHO no. 1046, at 2 (2000), "at 2" refers to the pinpoint citation within the looseleaf opinion.

Published OCAHO decisions are available through Westlaw (database identifier FIM-OCAHO), or through OCAHO's website (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

upon a July 12, 2000, deadline for the submission of Interrogatory responses. R. Opp. at 7. Respondent explains that the parties had agreed only that the responses would be filed at some point during the week ending July 14, 2000. Id. Third, Respondent implies that, under OCAHO's procedural rules and the analogous Federal Rules of Civil Procedure, interrogatory responses need not be signed under oath when the responsive party is objecting to some of the interrogatories, rather than answering each of them. Id. at 6-7.

With respect to the contested Requests for Production of Documents, Respondent argues that its objections should be sustained because Complainant has failed to satisfy its burden of showing the relevance of its discovery requests. Id. at 10. In support of its contention that Complainant bears the initial burden of proving that its discovery requests are relevant, Respondent cites United States v. Volvo Trucks North America, Inc., 7 OCAHO no. 994, 1088, at 1092 (1998). Id. at 5. In addition, Respondent argues that Complainant's Motion to Compel should be denied because Complainant has not made a good faith effort to obtain the documents without judicial intervention. Id. at 8, 9. Further, Respondent argues that Complainant's Motion to Compel is premature in light of Complainant's recent decision to withdraw Count V of the Complaint. Id. at 9-10.

III. APPLICABLE STANDARDS

The scope of inquiry during discovery extends to any relevant information that is not privileged. 28 C.F.R. § 68.18(b) (2000). In the discovery context, relevancy "'has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, an issue that is or may be in the case.'" United States v. Ro, 1 OCAHO no. 265, 1700, at 1702 (1990), 1990 WL 512118, at *1-2 (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

If a party fails to respond adequately to a discovery request, or objects to the request, or fails to permit inspection as requested, the discovering party may move to compel a response or an inspection. 28 C.F.R. § 68.23(a) (2000). In proceedings before OCAHO Judges, motions to compel must set forth and include:

> (1) The nature of the questions or request;
> (2) The response or objections of the party upon whom the request was served;
> (3) Arguments in support of the motion; and
> (4) A certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge.

28 C.F.R. § 68.23(b). Although OCAHO has its own procedural rules for proceedings arising under its jurisdiction, it is well-settled that OCAHO Judges may refer to analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding

contested issues. See United States v. Westheimer Wash Corp. d/b/a Bubbles Car Wash, 7 OCAHO no. 989, 1042, at 1044 (1998), 1998 WL 745996, at *2. Section 68.23 of the OCAHO procedural rules is similar to Federal Rule of Civil Procedure 37(a)(2)(B), which provides for motions to compel responses to discovery requests in cases before the federal district courts. Consequently, Rule 37 and federal case law interpreting it are useful in deciding whether a motion to compel should be granted under the OCAHO rules. See generally Westheimer Wash Corp., 7 OCAHO no. 989, at 1044. Because this action arose in the State of Texas, relevant case law from the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) constitutes binding authority; case law from other circuit courts constitutes persuasive, but not binding, authority.

Responses to interrogatories and requests for production must either comply with the discovery request or state the reasons for objection to the request. 28 C.F.R. §§ 68.19(b), 68.20(e) (2000). Moreover, the party objecting to a request for production or an interrogatory bears the burden of persuasion. 8A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE (hereafter WRIGHT & MILLER) § 2173 at 291-93 & nn. 13-15 (2d ed. 1994 & Supp. 2000). Therefore, the objecting party must articulate its objections in specific terms and demonstrate that the objections are justified. 28 C.F.R. § 68.23(a). Generalized or conclusory assertions of irrelevance, overbreadth or undue burden are not sufficient to constitute objections. McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990) (finding that a party's conclusory statement that a production request was overly broad and burdensome was not sufficient to raise a successful objection to the request); see also Panola Land Buyers Ass'n. v. Shuman, 762 F.2d 1550, 1559 (11th Cir. 1985); Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982) (holding that a "party resisting discovery 'must show specifically how ... each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.'").

IV. ANALYSIS

A. Certification of Good Faith Conferment

As previously stated, motions to compel in OCAHO proceedings are *prima facie* valid only if they are accompanied by "[a] certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge." 28 C.F.R. § 68.23(b)(4). Whether a movant has made an attempt to confer in good faith depends upon the specific facts of the case. Therefore, the following discussion describes the parties' positions regarding the adequacy of Complainant's efforts to confer.

1. Complainant's Certificate of Conference

In order to satisfy the certification of good-faith conferment requirement, Complainant's counsel (Ms. Fong) attached a "Certificate of Conference" to the Motion to Compel. In this document, Ms. Fong gives the following account of her efforts to obtain the requested answers and

documents without judicial intervention: On July 12, 2000, Ms. Fong received, by fax, Respondent's responses to Complainant's First Request for Production of Documents; however, she did not receive Respondent's responses to Complainant's Interrogatories. C. Mot. at 16-17. On July 13, Ms. Fong placed a telephone call to the office of Respondent's counsel (Ms. Nelson) to inquire as to the status of Respondent's Interrogatory responses. Id. at 17. Because Ms. Nelson was not in her office when Ms. Fong called, Ms. Fong left a voice-mail message requesting that Ms. Nelson call her back; however, Ms. Nelson was unable to return Ms. Fong's call on July 13. Id. On July 14, Ms. Fong telephoned Ms. Nelson and again left a voice-mail message requesting that Ms. Nelson call her back. Id. Also on July 14, Ms. Fong faxed a letter to the office of Ms. Nelson expressing Ms. Fong's view that Respondent had not complied with its obligation to respond to Complainant's discovery requests. Id. In the third paragraph of this letter, the text of which appears in capital letters and boldface, Ms. Fong indicated that Ms. Nelson should "**CONSIDER THIS LETTER AN ATTEMPT TO CONFER ON THE COMPLAINANT'S DISCOVERY REQUESTS PRIOR TO COMPLAINANT FILING A MOTION TO COMPEL**." In addition, Ms. Fong requested, in forceful terms, that Ms. Nelson call her back by 4:00 p.m. on that date, which was a Friday, to discuss Respondent's position vis à vis the contested discovery requests.

The next three pages of Ms. Fong's letter set forth Complainant's position regarding Respondent's objections to Complainant's First Request for Production of Documents. Ms. Nelson returned Ms. Fong's call on the morning of July 14, at which time she expressed her disagreement with Ms. Fong's view that Respondent's Interrogatory responses were due on July 12. C. Mot. at 17. During this same conversation, Ms. Nelson agreed to confer at greater length with Ms. Fong on July 18. Id. The proposed purposes of this July 18 conference were to discuss matters raised in this court's notice of prehearing conference, issued on July 12, as well as Respondent's responses to Complainant's discovery requests. Id. On July 17, Ms. Fong faxed a letter to Ms. Nelson confirming the July 18 conference and setting forth the matters to be discussed, including the contested discovery responses. Id.

On July 18, Ms. Fong conferred with Ms. Nelson and another attorney for Respondent, Robert Loughran, for about 90 minutes. Id. at 18. During the conference, Ms. Fong explained Complainant's position as to the deficiency of Respondent's responses to Complainant's First Request for Production of Documents. Id. at 18-19. Ms. Nelson and Mr. Loughran responded by challenging the relevancy of the contested Requests for Production and by stating that, until Complainant established the documents' relevancy, it would not be in the best interest of Respondent for the requested documents to be produced. Id. at 18-19. When Ms. Fong sought to discuss Respondent's responses to Complainant's Interrogatories, Ms. Nelson and Mr. Loughran indicated that they were not then prepared to discuss the Interrogatory responses. Id. at 20. Consequently, the July 18 meeting came to an end without any substantive discussion regarding Respondent's responses to Complainant's Interrogatories. On July 19, Ms. Fong both telephoned and faxed a letter to Ms. Nelson requesting that they confer about the contested Interrogatories prior to the prehearing conference scheduled for July 20; however, early on July 20, Ms. Nelson responded by telephone and indicated that her schedule could not accommodate such a conference. Id. During their July 20 conversation, Ms. Fong offered to meet with Ms. Nelson during the following week, on July 25 or

July 27. Id. Ms. Nelson indicated that she would consult her calendar and return Ms. Fong's call. Id. at 21. On July 24, having received no response to her offer of a meeting on July 25 or July 27, Ms. Fong filed the present Motion to Compel.

2. Respondent's Opposition

Respondent argues that Complainant submitted the present Motion to Compel without having conferred with Respondent in a good faith effort to obtain the requested discovery responses without judicial intervention. R. Opp. at 3-4. Specifically, Respondent asserts that Ms. Fong's stated intention, in her July 14 fax, to submit a Motion to Compel, indicates that she never intended to resolve the discovery dispute without court involvement. Id. at 4. In addition, Respondent argues that Ms. Fong acted unreasonably and unfairly by imposing short deadlines upon Respondent and by failing to ascertain mutually-convenient times for conferment. Id.

3. Conclusion: Complainant Has Satisfied the Certification of Good Faith Conferment Requirement

As an initial matter, I find that Ms. Fong's Certification of Conference provides a credible account of her efforts to obtain discovery responses from Respondent without court intervention. Ms. Nelson does not appear to challenge Ms. Fong's veracity; instead, she simply believes that the facts stated in Ms. Fong's Certification, and various items of correspondence between the parties, compel the conclusion that Ms. Fong did not act in good faith when attempting to confer with her.

OCAHO case law has not yet elucidated the specific requirements of the "certification of good faith conferment" provision appearing at 28 C.F.R. § 68.23(b)(4). However, a growing body of case law exists in the federal district courts delineating the scope of the analogous certification requirement of Federal Rule of Civil Procedure 37(a)(2)(B).See, e.g., Shuffle Master, Inc. v. Progressive Games, Inc.,170 F.R.D. 166, 170-72 (D. Nev. 1996) (denying a motion to compel where counsel for the movant failed to provide a detailed certification of conference and failed to confer in person with opposing counsel); Soto v. City of Concord, 162 F.R.D. 603, 623 (N.D. Cal. 1995) (denying a motion to compel where counsel for the movant had attempted to satisfy the good-faith conferment requirement by sending a single letter to opposing counsel). This case law provides useful, but not authoritative, guidance for resolution of the present dispute.

In Shuffle Master, the court found that a motion to compel would be "facially valid" under Federal Rule 37(a)(2)(B) only if it satisfied two conditions. First, the motion must contain an actual certification document that adequately sets forth "essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties." 170 F.R.D. at 171. Second, the court determined that the movant must show actual "performance" of its good-faith conferment obligations. Id. According to the court, the "conferment" requirement would be satisfied only if the parties engaged in, or attempted to engage in, an actual two-way communication, either in person or by telephone, in which "both parties presented the merits of their respective positions and meaningfully assessed the relative strengths of each." Id. at

172. Moreover, to act in "good faith," the parties had to manifest "honesty [of] purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action." Id. Only when the movant persuades the court that "informal negotiations reached an impasse on a substantive issue in dispute," would the court deign to intervene in a discovery dispute. Id.

Although I disagree with several of the Shuffle Master Court's legal conclusions, the case provides a useful conceptual framework within which to analyze whether a movant has satisfied its good-faith conferment obligations. Consequently, I now proceed to assess the adequacy of both Complainant's certification of conference and its performance.

a. Certification of Conference

I hold that Complainant's 6-page Certification of Conference satisfies the certification requirement because it contains "essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties." Shuffle Master, 170 F.R.D. at 171. Specifically, the document provides a highly detailed explication of Complainant's efforts to secure the requested information without court involvement. Among other things, it identifies the names of the persons who conferred and attempted to confer, describes the means of communication they employed, states the time and date of the conference as well as its length, describes the issues which the parties discussed, and explains that counsel were not able to agree on a mutually-acceptable method of securing the requested information without court intervention.

b. Performance

(1) Good Faith

An attorney's obligation to confer in good faith before filing a motion to compel must be understood in context. Litigation is an inherently adversarial process, and an attorney's dealings with opposing counsel are always constrained by the overriding obligation to act as a zealous advocate. One can confer in good faith from an adversarial posture; indeed, one often must do so. In the litigation context, therefore, "good faith conferment" contemplates an honest and civil exchange of views, an absolute rejection of deceptive or fraudulent practices, and above all an authentic desire to obtain discoverable information without court involvement.

In the instant proceeding, Respondent objected to most of Complainant's Requests for Production. Moreover, Ms. Fong–who apparently believed that Respondent's Interrogatory responses were due on July 12–was plainly laboring under the impression that Respondent had simply opted to ignore Complainant's Interrogatories. Contrary to Respondent's assertion, Ms. Fong's statement, in her July 14 fax, that she "will be filing a motion to compel next week" does not imply a preconceived intention on her part to file a motion to compel regardless of the outcome of any conference between the parties. Rather, that statement manifested Ms. Fong's present intention, as

of July 14, to file a motion to compel in the event Respondent persisted in its objections to, and perceived disregard of, Complainant's discovery requests. During counsel's 90-minute conference on July 18, Ms. Fong explained her bases for believing that Respondent's objections were inadequate; however, Ms. Nelson and Mr. Loughran manifested an apparent unwillingness to abandon those objections or, in the case of its Interrogatory responses, to even discuss them at that time. Apparently, Complainant's countervailing arguments were not sufficient to persuade Respondent to comply with Complainant's discovery requests. Complainant could reasonably conclude that Respondent had adopted a firm litigating position vis à vis Complainant's discovery requests, and that no additional amount of conferment would induce Respondent to produce the requested information without court involvement.

When, as here, a party objects to a discovery request, the discovering party has two choices: it can either acquiesce in the resisting party's objections or it can attempt, through the conferment process, to persuade the resisting party that its objections lack merit. If the former alternative is incompatible with the discovering party's interest and the latter alternative proves futile after a good faith effort, there is nothing further to discuss; in short, "informal negotiations reached an impasse on a substantive issue in dispute." Shuffle Master, 170 F.R.D. at 172. In such cases the parties' positions have been defined with such precision that additional attempts to confer would be futile. The requirement of "good faith conferment" does not compel discovering parties to flog a dead horse. Accord Reidy v. Runyan, 169 F.R.D. 486, 490 (E.D.N.Y. 1997) (good-faith conference unnecessary where counsel for resisting party conceded that it "would have argued that its discovery responses had fully complied with any obligations"); Matsushita Elec. Corp. v. 212 Copiers Corp., No. 93 Civ. 3243, 1996 WL 87245 at * 1 (S.D.N.Y. 1996) (good-faith conference requirement would be futile where the discovery dispute occurred within the context of "very bitter litigation"); Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 193, 196-98 (N.D.W.Va. 2000) (actual "meeting was not required because any telephone call or in person meeting would not likely have been successful in resolving this discovery dispute."); Hewitt Assocs., LLC v. Zerba, No. 96 C. 2428, 1996 WL 734716, *2 (N.D. Ill. 1996) (waiving the good-faith conference requirement where "the motion to compel is probably inevitable.").

In conclusion, I hold that Ms. Fong acted in good faith when she conferred and attempted to confer with Ms. Nelson. The mere fact that the conference was unsuccessful is not evidence that it was conducted in bad faith.

(2) Conferment

In this proceeding, counsel engaged in an actual two-way communication on July 18, 2000. During this conference, counsel discussed their differing views regarding Complainant's Requests for Production. Apparently they did not discuss Complainant's Interrogatories because counsel for Respondent were not prepared to do so. I am unsympathetic to Respondent's claim that counsel was not given sufficient time to prepare and set forth its position regarding the Interrogatories. After all, Respondent's counsel actually answered and objected to those Interrogatories four days prior to the conference. If Respondent's counsel understood Respondent's position well enough to respond to

the Interrogatories on July 14, it should also have understood that position well enough to discuss those Interrogatories on July 18.

I hold that counsel's July 18 meeting satisfied Complainant's "conferment" obligations under 28 C.F.R. § 68.23(b)(4). In so holding, however, I neither reject nor adopt Shuffle Master's "actual conferment" requirement. Because counsel's July 18 meeting would have satisfied even the most stringent "actual conferment" requirements, I need not decide whether a less direct, written, exchange of views would have sufficed.

In conclusion, I find that Ms. Fong has satisfied the good faith certification of conference requirement of 28 C.F.R. § 68.23(b)(4). Therefore, Complainant's Motion to Compel is *prima facie* valid. I now proceed to address its merits.

B. The Merits of Complainant's Motion to Compel

1. Complainant's Interrogatories

Complainant makes no arguments regarding the merits of Respondent's objections to its Interrogatories. Instead, Complainant argues that Respondent's objections should be ignored because of procedural defects in Respondent's responses. Specifically, Complainant argues that the responses were submitted two days late, and that they are not properly attested. C. Mot. at 6-7. For the reasons stated below, I hold that Respondent filed timely responses to Complainant's Interrogatories, but that Respondent failed to attest to those responses properly.

a. Respondent's Interrogatory Responses Were Timely Filed

Complainant avers that Respondent failed to meet its July 12, 2000, deadline for submitting responses to Complainant's Interrogatories. Respondent denies that any such deadline existed and contends that its July 14, 2000, responses were timely filed. Thus, the parties simply disagree as to the deadline.

The parties did not memorialize their discussion regarding the revised deadline for submission of Respondent's responses in a written agreement; therefore, the court has no objective evidence supporting either side's position. In the absence of any tangible evidence of bad faith by either party, I infer that counsel simply misunderstood each other, and failed to reach a meeting of the minds as to the revised deadline. Therefore, in light of the minimal prejudice to Complainant associated with accepting Respondent's responses two days later than expected, I am disposed to give Respondent the benefit of the doubt. Accordingly, Complainant's Motion to Compel is DENIED to the extent that it makes Respondent's alleged tardiness a basis for striking Respondent's objections.

b. Respondent's Interrogatory Responses Were Improperly Attested

Complainant argues that Respondent's Interrogatory responses are inadequate because they contain no sworn signature of any officer or authorized agent of Respondent. Respondent seeks to rebut Complainant's argument by contending that a corporate agent does not need to sign the responses when objections are made. R. Opp. at 6-7. Apparently, Respondent believes that when the responding party objects to any of the interrogatories, no sworn signature is required, even as to those interrogatories that were answered without objection. In this respect, Respondent is wrong.

OCAHO procedural rules dictate that interrogatories propounded to a corporation may be answered by "any authorized officer or agent [of the corporation], who shall furnish such information as is available to the [corporate] party." See 28 C.F.R. § 68.19(a) (2000). This rule is virtually identical to Rule 33(a) of the Federal Rules of Civil Procedure; therefore, federal case law construing Rule 33 constitutes useful guidance in resolving the present dispute.

As an initial matter, Complainant errs when it argues that Respondent's Interrogatory responses may not be answered by Respondent's counsel: "Rule 33 ... expressly provides that interrogatories directed to a corporate party may be answered 'by any officer or agent, who shall furnish such information as is available to the party.' This language has been uniformly construed to authorize 'answers by an attorney' for the party." See Wilson v. Volkswagen of America, 561 F.2d 494 (4th Cir.), cert. denied, 434 U.S. 1020 (1977); see also Rea v. Wichita Mortgage Corp., 747 F.2d 567, 574 n.6 (10th Cir. 1984); United States v. 42 Jars of "Bee Royale Capsules", 264 F.2d 666, 670 (3d Cir. 1959); General Dynamics Corp. v. Selb Mfrs Co., 481 F.2d 1204, 1210 n.1 (8th Cir. 1973); 8A WRIGHT & MILLER § 2172 at 286 & n.15 (1994 & Supp. 2000). I see no reason to adopt a different rule for interrogatory responses submitted pursuant to 28 C.F.R. § 68.19. Thus, Ms. Nelson may answer the contested Interrogatories in her capacity as Respondent's "authorized agent." In doing so, however, Ms. Nelson must assume the responsibilities inherent in such a status; specifically, she must sign Respondent's answers *under oath.* Fernandes v. United Fruit Co., 50 F.R.D. 82, 85-86 (D. Md. 1970) (holding that "[a]n attorney for a corporation may sign and swear to answers to interrogatories addressed to it if he makes oath that to the best of his knowledge, information and belief the answers are true and contain all information which is available to the corporation...."); see also Monroe v. Ridley, 135 F.R.D. 1, 3 (D.D.C. 1990) (citing Continental Ins. Co. v. McGraw, 110 F.R.D. 679, 682 (D. Colo. 1986)); U.S. v. 58.16 Acres of Land, 66 F.R.D. 570, 571-72 (E.D. Ill. 1975); Cabales v. U.S., 51 F.R.D. 498, 499 (S.D.N.Y. 1970), aff'd, 447 F.2d 1358 (2d Cir. 1971). It is only by signing under oath that Respondent's counsel, acting as an "agent," can bind Respondent and provide the basis for contradiction or impeachment of Respondent's testimony at trial.

In arguing that Respondent's counsel may not answer interrogatories in behalf of a client, Complainant cites Ironworkers Local 455 v. Lake Constr. & Dev. Corp., 6 OCAHO no. 911, 1039, 1042-43 (1997). In Ironworkers Local 455, the court was confronted with Interrogatory answers that, although signed by respondent's counsel, contained no unequivocal oath–either from counsel acting as "agent" or from the corporate principal. Instead, counsel answered upon "information and

belief" while respondent's corporate officers submitted a document entitled "Corporate Verification" in which they declared that they knew the "contents" of their lawyer's discovery responses to be true "except as to matters stated on information and belief." As a result, the court was faced with a puzzling phenomenon. Respondent's putative "agent," i.e., its counsel, was unwilling to attest fully to the truth of the statements he was making in behalf of his principal, while the principal was similarly unwilling to commit itself regarding the truth of the statements made by the "agent." When, as in Ironworkers Local 455, a principal's statements create doubt as to the scope of the agent's authority, the agent's statements tend to lose their binding character and become mere opinions or impressions. As I read the ruling in Ironworkers Local 455, the Judge did not rule that lawyers can never sign interrogatory answers in their capacity as the "authorized agent" of a corporate client; rather, the court simply ruled that counsel's averments in behalf of a corporate principal, made upon "information and belief," cannot constitute sworn attestations when the principal, by its cryptic statements, tends to cast doubt on the scope of counsel's agency.

The facts of the instant proceeding are clearly distinguishable from those in Ironworkers Local 455. Here, Respondent/principal has at no time cast doubt upon the authority of its counsel/agent to answer for and bind it; instead, Respondent's counsel asserts that she had no obligation to sign under oath because she had objected to some of the interrogatories.

Respondent's counsel errs when she argues that she is relieved of the signature-under-oath requirement simply by virtue of the fact that she has objected to some of the Interrogatories. If Respondent had objected to, and not answered any of, Complainant's 36 Interrogatories, counsel's argument would have merit; however, such is not the case. In this proceeding, Respondent answered Interrogatories Numbered 1-6, 10 and 25, objected to but also answered in part Interrogatories Numbered 7-9, 11, 16, 23, 24, 27 and 33, objected to Interrogatories Numbered 12-15, 17, 19-22, 28-32, 34 and 36, and acknowledged its duty to answer Interrogatories Numbered 18, 26 and 35. Respondent's counsel is correct that she need not sign Respondent's objections under oath; however, the present responses contain both answers and objections. As a matter of logic and sound policy, a party who answers some interrogatories must have the same attestation obligation, via à vis the interrogatories it chooses to answer, as a party who answers all interrogatories. Aside from simply supplying information, the purpose of sworn interrogatories is to narrow disputed issues in anticipation of trial. When a party answers an interrogatory under oath, that party binds itself with respect to its answer, thus permitting the parties to move on to the next disputed issue. Yet Respondent's interpretation, which would leave the entire discovery process in limbo until Respondent's last objection is reconciled, turns the efficiency-function of discovery on its head.

Because Respondent answered in part Complainant's Interrogatories without providing a sworn attestation that its answers were true, Respondent has not complied with 28 C.F.R. § 68.19(b). Therefore, Complainant's Motion to Compel is GRANTED insofar as it makes Respondent's improper attestation a ground for rejecting Respondent's responses. However, rather than striking Respondent's objections, instead Respondent is ordered to re-file its answers with a sworn attestation, either by counsel or a corporate agent, that its answers are true. See 58.16 Acres of Land, 66 F.R.D. at 572; Cabales v. United States, 51 F.R.D. at 499; Johns v. U.S., No. Civ.A. 96-1058,

1998 WL 15119, *1-2 (E. D. La. 1998). Moreover, Respondent's resubmitted responses may not state general objections, such as privilege, unless Respondent states which privilege applies to each specific Interrogatory and the basis for the privilege objection. See Order Governing Prehearing Procedures, at 3 (June 1, 2000). While Respondent's resubmitted responses may augment its original response, i.e., by answering Interrogatories Numbered 18, 26 and 35, or by supplementing its responses to any other Interrogatory for which additional information is now available, Respondent may not file any new objections. Respondent's resubmitted sworn responses must be received by Complainant not later than August 25, 2000. If Respondent continues to object to Complainant's Interrogatories, or if Complainant believes that Respondent's resubmitted responses are inadequate, the parties must, as required by 28 C.F.R. § 68.23(b)(4), confer or attempt to confer in good faith in an effort to secure the requested information without judicial intervention. If no extrajudicial resolution is possible, Complainant may file a Motion to Compel addressing the merits of Respondent's objections or explaining why Respondent's answers are inadequate.

2. Complainant's First Request for Production of Documents

As a threshold matter, I address Respondent's contention that Complainant bears the initial burden of showing that its requests for production are relevant, i.e., that they "'encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, an issue that is or may be in the case.'" Respondent finds support for this proposition in a prior OCAHO decision, where the Judge stated, without citing case authority, that "[i]t is the *de minimis* burden of the proponent of the material to be discovered to establish its relevancy." United States v. Volvo Trucks North America, Inc., 7 OCAHO no. 994, 1088, at 1092 (1998). I greatly respect the views of my colleagues, and carefully review their decisions. While such rulings are often persuasive precedents, they do not constitute binding authority, and where the ruling of another OCAHO Judge appears to be contrary to law, I must decline to follow it. In this instance, I cannot reconcile the above-quoted language with my own understanding of the law governing discovery.

It is undoubtedly true that a court, either on motion or *sua sponte*, may strike a discovery request that on its face bears no conceivable relationship to any issue or potential issue in the case, Jones v. Metzger Dairies, Inc., 334 F.2d 919, 925 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965); however, I categorically reject the proposition that a proponent of discovery is obliged to support each discovery request with a statement explaining its relevance. On the contrary, it is the burden of the objecting party to articulate a specific basis for any objection, including lack of relevance. See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990) (holding that a party objecting to requests for production bears the burden of showing specifically how each request is objectionable). Thus, to the extent that Volvo Trucks sets forth a requirement–even a *de minimis* requirement–that a proponent of discovery must justify each of its requests for production to the responding party as a condition of the responding party's compliance, I specifically reject it and decline to follow its holding. With this in mind, I now proceed to address Complainant's Motion to Compel with respect to each contested Request for Production.

Complainant's Request for Production Number 2 seeks all corporate documents filed by Respondent with the Texas Secretary of State from November 6, 1986, to the present. Respondent objects to this request on the ground that Complainant is asking Respondent to provide it with public records that are equally accessible to both parties. In its Motion to Compel, Complainant expresses the view that material is not undiscoverable merely because it is a public record. Complainant is in error. As Respondent contends, the general rule is that public records need not be produced if they are equally accessible to both parties. See SEC v. Samuel H. Sloan & Co., 369 F. Supp. 994, 995-96 (S.D.N.Y. 1973); Henshaw v. Hennessy Industries, Inc., No. CIV. A. 91-2248-KHV, 1993 WL 818323, *1 (D. Kan 1993); Dushkin Publ. Group v. Kinko's Service Corp., 136 F.R.D. 334, 335 (D.D.C. 1991). However, in proceedings where the burden to the discovering party of obtaining the records from public sources far exceeds the burden of production that confronts the responding party, courts have occasionally been willing to compel the production of public documents. See RTC Mortgage Trust 1994-S3 by Trotter Kent, Inc. v. Guadalupe Plaza, 918 F. Supp. 1441, 1451 (D.N.M. 1996) (compelling the production of public documents where the party resisting discovery "is far more likely than [the discovering parties] to know precisely which public entities possess the information [the discovering parties] seek."); Snowden v. Connaught Labs., Inc.,137 F.R.D. 325, 333 (D. Kan. 1991) (compelling the production of public court documents in the possession of the party resisting discovery where the discovering party would have had to travel to courthouses throughout the country to obtain the same documents). The facts of the instant proceeding reveal that Complainant would face a comparatively light burden in obtaining the requested documents from public sources. Unlike the request in RTC Mortgage Trust, for example, Complainant's Request for Production seeks documents submitted to a specifically-named governmental agency. It is apparent, therefore, that Complainant already knows "precisely which public entities possess the information" it seeks. Moreover, unlike the discovering party in Snowden, Complainant seeks documents located within its own state. Consequently, Respondent's objection is sustained and I hereby DENY Complainant's Motion to Compel with respect to Request for Production Number 2.

Complainant's Request for Production Number 3 seeks minutes of all Respondent's Board of Directors meetings, committee meetings and shareholder meetings from November 6, 1986, to the present. Respondent objects to this request on the grounds that it is overbroad, unduly burdensome and irrelevant. The requested documents are relevant because they may reveal whether Respondent was ever dissolved as a corporate entity or compelled to liquidate its assets. Such information will help establish whether the requested civil money penalties are "excessive," as Respondent claims. Therefore, I hereby GRANT IN PART Complainant's Motion to Compel with respect to Request for Production Number 3. Respondent must produce the requested documents; however, I can discern no reason why Complainant would need Respondent's meeting minutes from 14 years ago. To prevent this request from being unduly burdensome, I hold that Respondent need only provide the requested documents for the period from January 1, 1996, to the present.

Complainant's Request for Production Number 4 seeks all records of issuance or transfer of shares in Respondent from November 6, 1986, to the present. Without discussing specifics, Respondent also objects to this request on the grounds that it is overbroad, unduly burdensome and irrelevant. The requested documents are relevant because they may provide a basis for determining

the credibility of Respondent's claim that it inherited a number of "grandfathered" employees from a predecessor corporation. At the same time, the request seems excessively broad because it likely encompasses share transfers that are totally unrelated to Respondent's merger with or acquisition of predecessor companies. Therefore, I hereby GRANT IN PART Complainant's Motion to Compel with respect to Request for Production Number 4. Respondent must produce all records in its possession or under its control that reflect or describe an issuance or transfer of shares in Respondent pursuant to any merger, sale or acquisition.

Complainant's Request for Production Number 5 seeks all "assumed name" certificates of Respondent filed with federal, state, county or municipal governmental authorities during the period from November 6, 1986, to the present. Respondent objects that the request is irrelevant, but states no basis for this legal conclusion. The requested documents are relevant because they will reveal whether Respondent possesses any assets or is doing any business under names other than Allen Holdings, Inc. Therefore, I hereby GRANT Complainant's Motion to Compel with respect to Request for Production Number 5.

Complainant's Request for Production Number 6 seeks all franchise tax reports, sales tax reports, and any other reports or documents that Respondent has filed with the Texas Comptroller of Public Accounts from January, 1996, to the present. Respondent objects that the request is overbroad, unduly burdensome and irrelevant. In addition, Respondent points out that the request seeks public documents that are equally accessible to both parties. Because Respondent's state tax reports are public documents that are equally accessible to both parties, I hereby DENY Complainant's Motion to Compel with respect to Request for Production Number 6.

Complainant's Request for Production Number 7 seeks all property tax, ad valorem tax, and personal property tax assessments against Respondent from January, 1997, to the present. Respondent objects that the request is vague and ambiguous, overbroad, unduly burdensome, irrelevant and redundant. Although the requested information is relevant to a determination of the size of Respondent's business, I agree with Respondent that any information produced in response to this request would be duplicative of documents produced in response to Request for Production Number 10, which I address *infra*. Therefore, I hereby DENY Complainant's Motion to Compel with respect to Request for Production Number 7.

Complainant's Request for Production Number 8 seeks all records revealing the nature of Respondent's corporate structure. In addition to a general objection on grounds of relevance, Respondent argues that the requested documents are public records that are equally accessible to both parties. As a threshold matter, I note that Complainant's Motion for Partial Summary Decision as to Liability, filed on June 9, 2000, contains a copy of Respondent's Articles of Incorporation as an attachment. This document, without more, is sufficient to show that Respondent is a corporation. Further, Respondent objects that documents concerning its corporate structure are publicly available through the Office of the Secretary of State of Texas. Because the information Complainant seeks is contained in public documents that are equally accessible to both parties, I hereby DENY Complainant's Motion to Compel with respect to Request for Production Number 8.

Complainant's Request for Production Number 9 seeks all of Respondent's Internal Revenue Service (IRS) documents (including tax returns, schedules, and attachments) from 1996 to the present. Respondent objects to this request on the ground that it already produced its IRS documents during an INS inspection in July, 1998. I hereby GRANT IN PART Complainant's Motion to Compel with respect to Request for Production Number 9. Although Respondent may have produced its 1996, 1997 and 1998 tax returns to INS inspectors in July, 1998, Respondent obviously did not produce its 1999 or 2000 tax returns at that time. Moreover, the request seeks not only returns, but attachments and schedules as well. Therefore, Respondent must provide all requested documents, except those already produced. When responding to this request, Respondent must (1) produce all requested documents it has not yet produced, and (2) specifically identify those documents that are responsive to Complainant's request but that have already been produced.

Complainant's Request for Production Number 10 seeks all documents that list Respondent's assets and liabilities from January 1, 1997, to the present. Respondent makes no objection to this request, but merely states that it has not yet found the requested information. Lack of diligence is not a basis for resisting discovery. Therefore, I hereby GRANT Complainant's Motion to Compel with respect to Request for Production Number 10.

Complainant's Request for Production Number 11 seeks all documents regarding transfers of Respondent's assets and liabilities from January 1, 1997, to the present. Respondent makes no objection to this request, but merely states that it has not yet found the requested information. I hereby GRANT Complainant's Motion to Compel with respect to Request for Production Number 11.

Complainant's Requests for Production Numbers 12 and 13 seek all Respondent's bank statements and brokerage statements, respectively, from January 1, 1998, to the present. Respondent objects, without specifics, on the grounds that the requests are vague and ambiguous, overbroad, and irrelevant. Respondent has claimed, in its Sixth Affirmative Defense, that Complainant's requested civil money penalties are excessively punitive in light of a recent decline in Respondent's financial solvency. Obviously, to the extent that Respondent's bank and brokerage statements reflect its financial condition, those records are relevant to determining whether the requested civil money penalties are excessive, as Respondent claims. Therefore, I hereby GRANT Complainant's Motion to Compel with respect to Requests for Production 12 and 13.

Complainant's Request for Production Number 14 seeks all of Respondent's applications for financial assistance from the federal Small Business Administration (USSBA) from November 6, 1986, to the present. Respondent objects that the requested documents are irrelevant. However, the requested documents will plainly reveal whether the USSBA deems Respondent a "small business." Determining the size of Respondent's business is relevant to establishing a proper penalty, if any. At the same time, it appears to me that Request for Production Number 14 is, in terms of its temporal scope, overbroad as drafted. Therefore, I hereby GRANT IN PART Complainant's Motion to Compel with respect to Request for Production Number 14. Although Respondent must produce the requested documents, it need only do so for the period from January 1, 1996, to the present.

Complainant's Request for Production Number 15 seeks all documents submitted by Respondent to the Texas Employment Commission or the Texas Workforce Commission regarding its employees during each quarter from January 1, 1997, to the present. Respondent objects that it already produced the requested documents during an INS inspection; moreover, Respondent contends that the request is irrelevant, overbroad, vague and unduly burdensome. I agree with Respondent that Request for Production Number 15 appears overly broad and unduly burdensome in light of Complainant's stated reason for desiring the documents, i.e., to determine how many employees Respondent had during each quarter from January 1, 1997, to the present. Although the number of Respondent's employees is relevant to a determination of the size of Respondent's business, that information can be obtained in a much less burdensome fashion by simply propounding an interrogatory. Moreover, documents submitted to the Texas Employment Commission and the Texas Workforce Commission would appear to be public documents that are equally accessible to both parties. Therefore, I hereby DENY Complainant's Request for Production Number 15.

Complainant's Request for Production Number 16 seeks any documents listing the names of Respondent's current employees. Respondent objects to this request on the ground that it is irrelevant and that a response would intrude on the privacy interests of Respondent's employees. Standing issues aside, courts are always permitted to consider the privacy interests of non-parties when ruling on the propriety of discovery requests. In Kamal-Griffin v. Cahill Gorden & Reindell, 3 OCAHO no. 460, 647, at 656-57 (1992), a case brought by a pro se complainant against a law firm pursuant to 8 U.S.C. § 1324b, the court was confronted with a motion to compel the law firm to produce a list of the names and last-known addresses of certain unsuccessful job applicants. The law firm refused to provide the information on the ground, *inter alia*, that the request was "invasive of confidential relationships." In a decision granting in part and denying in part the Complainant's Motion to Compel, the court held that "in ruling on discovery motions directed at private information, it is appropriate to balance the individual's right of privacy against the public need for discovery in litigation." Id. at 657 (quoting Cook v. Yellow Freight Systems, Inc., 132 F.R.D. 548, 551 (E.D. Cal. 1990)). In this instance, the privacy interest at issue, i.e., the employees' interest in not having their names revealed to INS, is *de minimis*. However, Complainant's apparent need for the specific names of Respondent's employees also seems quite minimal. As noted previously, if Complainant wants to know how many employees Respondent has, the desired information could be more easily obtained by simply asking Respondent, in an interrogatory, how many employees it has. In light of the minimal public purpose that will be served by production of a list of the names of Respondent's employees, I hereby DENY Complainant's Motion to Compel with respect to Request for Production Number 16. If Complainant's goal is merely to determine the size of the employer, then the *names* of the employees are not relevant. In light of the minimal utility to be derived, in a paperwork violations case such as this, from production of a list of employee names, it seems to me that the employees' privacy interests, although minimal, outweigh the public's need for the information.

V. CONCLUSION

Complainant's Motion to Compel Discovery is GRANTED IN PART AND DENIED IN PART. Specifically, Complainant's Motion to Compel Discovery is GRANTED with respect to Requests for Production Numbers 5, 10, 11, 12 and 13; GRANTED IN PART with respect to Requests for Production Numbers 3, 4, 9 and 14; and DENIED with respect to Requests for Production Numbers 2, 6, 7, 8, 15 and 16. Moreover, Complainant's Motion to Compel Discovery is DENIED insofar as it alleges that Respondent filed its responses late, but is GRANTED insofar as it alleges that Respondent failed to provide proper attestation for its Interrogatory answers. Consequently, Respondent must resubmit its Interrogatory responses to Complainant, with proper sworn attestation, by August 25, 2000. Moreover, Respondent must produce documents in response to Requests for Production 3, 4, 5, 9, 10, 11, 12, 13 and 14 by September 5, 2000.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE